Nos. 83-245 and 83-291

In The
Supreme Court of the United States

October Term, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,
v.
R.A. GRAY & CO.,
Appellee.
No. 83-245

OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND,
Appellant,
v.
R.A. GRAY & CO.,
Appellee.
No. 83-291

On Appeal From The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF REPUBLIC INDUSTRIES, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLEE R.A. GRAY & CO.

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MOTION OF REPUBLIC INDUSTRIES, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLEE R.A. GRAY & CO.

Pursuant to Supreme Court Rule 36.3, Republic Industries, Inc. ("Republic") asks leave to file the attached brief *amicus curiae* in support of R.A. Gray & Co., the Appellee in Nos. 83-245 and 83-291.

Both the Appellee, R.A. Gray & Co., and the Pension Benefit Guaranty Corporation, Appellant in No. 83-245, have consented to the filing of this *amicus* brief in No. 83-245. The Oregon-Washington Carpenters—Employers Pension Trust Fund, Appellant in No. 83-291, has withheld its consent.

Republic has been subjected to withdrawal liability claims exceeding its entire net worth that have been asserted by several multiemployer pension funds under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 Stat. 1208, *et seq.* All arise from the pre-enactment termination of the business operations of a former subsidiary of Republic that has been dissolved.

Republic has six pending cases in which it challenges the constitutionality of retroactive application of MPPAA. In one, the Court of Appeals for the Fourth Circuit has upheld the statute. *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir. 1983). Republic has filed a petition for certiorari asking this Court to review the Fourth Circuit's judgment. *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, No. 83-541. The Court has not yet acted on the petition.

Inasmuch as Republic's survival depends on the outcome of these pending appeals, the Court should grant Republic leave to file the attached *amicus* brief.

Respectfully submitted,

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BRIEF OF REPUBLIC INDUSTRIES, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE R.A. GRAY & CO.

INTERESTS OF THE *AMICUS*

As successor in interest to Johnson Motor Lines, Inc. ("Johnson"), *amicus curiae* Republic Industries, Inc. ("Republic") has been subjected to "withdrawal liability" claims exceeding its entire net worth that have been asserted by several multiemployer pension funds under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 Stat. 1208, *et seq.*, which became law on September 26, 1980. All of the claims are based on the pre-enactment termination of Johnson's business operations on August 8, 1980. Prior thereto, Johnson had been an interstate motor carrier of freight and, pursuant to collective bargaining agreements with several Teamsters locals, had made periodic contributions to various multiemployer pension funds. The agreements required that defined contributions be made in exchange for specified units of work. When the work stopped, Johnson's contractual duty to contribute ceased.

In the aggregate, the principal amount of the claims asserted is $19,744,000, which is substantially more than Republic's entire net worth and more than Johnson's cumulative net earnings over the 35 years of its existence. If paid on the installment schedules established pursuant to 29 U.S.C. § 1399(c), the amounts claimed, with interest tacked on for failure to pay the liability immediately in a lump sum, exceed $25,537,000.

At the time Johnson's directors decided to close its business because of severe operating losses, neither they nor the attorneys and accountants who advised them knew that this would constitute what Congress later defined as a "withdrawal". 29 U.S.C. §§ 1383(a), 1461(e)(2)(A). Had they

known then what they know now about the "withdrawal liability" provisions of MPPAA, Johnson's directors would have pursued other alternatives, even at a substantial loss, rather than permit the confiscation of the entire net worth of both Johnson and Republic, which controlled Johnson for only 14 months prior to the liquidation of its business.

Republic has filed six cases challenging the constitutionality of retroactive application of MPPAA. In one of the two cases that have been decided, the District Court has declared the statute unconstitutional as retroactively applied. *Republic Industries, Inc. v. New England Teamsters and Trucking Industry Pension Fund,* No. 81-2703-S (D. Mass. Aug. 3, 1983), *appeal docketed,* No. 83-1657 (1st Cir.). In the other, the Court of Appeals for the Fourth Circuit has upheld retroactive application of the statute. *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund,* 718 F.2d 628 (4th Cir. 1983).

Republic has asked this Court to review the Fourth Circuit's judgment. *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund,* No. 83-541 (U.S.). Republic's petition for certiorari and the affidavit of R.B. Riss set forth at pages 150a-165a of the appendix to the petition, cited herein as "*Republic* App.," describe how Johnson's pre-enactment termination of business came to subject Republic to an unexpected withdrawal liability that substantially exceeds its entire net worth.

STATEMENT

Applying the analytical framework set forth in *Nachman Corp. v. PBGC*, 592 F.2d 947 (7th Cir. 1979), *cert. denied on constitutional grounds*, 442 U.S. 940 (1979), *aff'd on statutory grounds*, 446 U.S. 349 (1980), the Ninth Circuit held that retroactive application of the withdrawal liability provisions of MPPAA violates the Due Process Clause of the Fifth Amendment. *Shelter Framing Corp. v. PBGC*, 705 F.2d 1502 (9th Cir. 1983). In *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir. 1983), the Fourth Circuit applied the same analytical framework but reached a different result, as did the Seventh Circuit in *Peick v. PBGC*, No. 82-2081 (7th Cir. Dec. 19, 1983). This Court must now resolve the conflict.

Constitutional issues ought not be decided in the "rarified atmosphere of a debating society" but rather "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Unfortunately, the record before this Court offers little guidance as to how the unfunded vested benefits liability allocated as withdrawal liability comes into being,[1] how

[1] The unfunded vested benefit liabilities of the pension funds allocated as withdrawal liability, 29 U.S.C. § 1381(b), are created through no fault of the employers. Lo Cicero Affidavit ¶¶ 16.11-.14, *Republic* App. at 192a-193a. Indeed, to the extent that 10% of the multiemployer pension funds covered by MPPAA's insurance scheme faced serious financial difficulties, they were in large measure caused by the minimum vesting requirements and the benefit reduction prohibitions created by ERISA. *See* PBGC,

(Footnote continued on following page)

actuaries go about hypothesizing the amount thereof,[2] and how the claimant funds have applied the so-called "ameliorative" provisions of MPPAA,[3] 29 U.S.C. §§ 1384, 1389(a)-(b), 1398(1)-(2), 1399(c)(1)-(2), and the statutory "exemptions,"[4]

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[1] *continued*
Multiemployer Study Required by Pub. L. No. 95-214, at 4, 15-17, 22-24, 94 (1978) [hereinafter "PBGC Study"]. The minimum vesting requirements established by ERISA dramatically exacerbated the unfunded vested benefit liabilities of multiemployer funds; in many cases, doubling, trebling or quadrupling them. Lo Cicero Affidavit ¶¶ 14, 16.11, *Republic* App. at 190a-193a.

[2] The amount of the liability is based on "actuarial assumptions" that are mere "guesstimates" of the unknown past and the unknowable future which usually "turn out to be wrong." Lo Cicero Affidavit ¶¶ 16.21-.27, *Republic* App. at 193a-200a. Even seemingly minor changes in actuarial assumptions can alter the size of the unfunded vested benefit liability allocated as withdrawal liability radically. For example, the actuary for the Central States Fund gave its trustees three different estimates of its unfunded vested benefit liability ranging from $2.047 billion to $4.108 billion. Each estimate was reported to be based on actuarial assumptions that, though different than those used in the other estimates, were "reasonable in the aggregate," 29 U.S.C. §§ 1393(a)(1)-(2), (b)(2), 1401(a)(3)(B). Lo Cicero Affidavit ¶ 16.27, *Republic* App. at 199a.

[3] Many lower courts have assumed that the ability to pay withdrawal liability in installments rather than in a lump sum is a significant ameliorating factor. *E.g., Peick v. PBGC*, 539 F.Supp. 1025, 1050 (N.D. Ill.), *aff'd*, No. 82-2081 (7th Cir. Dec. 19, 1983). But the installment-payment option actually increases the amount owed, as the funds require either that the principal amount claimed be paid immediately in a lump sum or that they be compensated for loss of its use through interest charges built into the amortization schedules set pursuant to 29 U.S.C. § 1399(c)(1).

[4] Whether the exemptions apply is an arbitrable "determination" made by the funds that can be overturned only if "unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(3)(A). The funds rarely find an exemption applicable. One that first determined the trucking industry exemption of 29 U.S.C. § 1383(d) applied to Republic later retracted its determination after receiving "conflicting interpretations" of the term "employer" in "informal discussions with PBGC's staff." *Republic* App. at 180a-181a, 183a-184a.

id §§ 1383(b)-(d), and "exclusions," [5] *id.* §§ 1397(a)(1)-(2).

Republic has made a record on these matters and invites the Court's attention to its Petition for Certiorari, No. 83-541, and the Appendix thereto. Republic is, of course, only one of many companies whose survival has been jeopardized by MPPAA. Its plight, however, is not atypical of the employers sandbagged by retroactive application of MPPAA.[6] The affidavits of Republic's chairman, *Republic* App. at 150a-165a, and of its actuarial consultant, *id.* at 185a-200a, and the correspondence exchanged between Republic and one of the many pension funds that have asserted withdrawal liability claims against Republic, *id.* at 166a-184a, 201a-206a, may assist the Court in understanding how this new statute actually is being interpreted and applied by the claimant funds charged with its implementation, 29 U.S.C. §§ 1382, 1399(b)(1), 1401(a)(3)(A)-(B), and in attaining a "realistic ap-

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[5] Whether the exclusions apply also is controlled by the funds' "determination" unless "unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(3)(A). *See Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund,* 718 F.2d 628, 634-35 (4th Cir. 1983).

[6] The Director of Finance for the Central States Fund has reported to the Fund's auditor that over half of the withdrawal liability identified as of August 24, 1981 was owed by companies in bankruptcy, and that the collectibility of the rest was doubtful because the financial condition of "the non-bankrupt companies, in most cases, is similar, in that these companies have also ceased operations due to their inability to operate as viable entities." Letter of John L. Sherry, Director, Financial Group, Central States, Southeast and Southwest Areas Pension Fund, to Sal Amatangelo, Arthur Young and Company, at 3 (August 24, 1981), Exhibit A, Plaintiffs' Memorandum In Opposition to Pension Fund Memorandum In Support of Cross-Motion, and in Opposition to Motion, for Summary Judgment, *Johnson Motor Lines, Inc. v. Central States, Southeast and Southwest Areas Pension Fund,* No. 81 C 3703 (N.D. Ill. filed July 1, 1981).

preciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United For Separation of Church and State,* 454 U.S. 464, 472 (1982).

SUMMARY OF ARGUMENT

The Ninth Circuit's judgment is sound and should be affirmed. As its well-reasoned opinion shows, retroactive application of MPPAA cannot be justified even if the analytical framework of *Nachman Corp. v. PBGC,* 592 F.2d 947 (7th Cir. 1979), *cert. denied on constitutional grounds,* 442 U.S. 940 (1979), *aff'd on statutory grounds,* 446 U.S. 349 (1980), governs the constitutionality of a statute which not only has retrospective effects, but which also is retroactive in application.

But even if the standard of review articulated in *Nachman* is appropriate for statutes having retrospective effects but which are substantially or entirely prospective in application, it is inappropriate for a statute, like MPPAA, which imposes a new and unexpected liability for pre-enactment conduct not triggering liability under the law in effect at the time the citizen acted. Such a statute clearly infringes the procedural due process right to notice and fair warning, a right which is "fundamental to our concept of constitutional liberty," *Marks v. United States,* 430 U.S. 188, 191 (1977), and which is a presupposition of the rule of law itself. *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972). If we are to remain a "government of laws and not of men," *Marbury v. Madison,* 5 U.S. (1 Cranch) 157, 163 (1803), our citizens must be *at least presumptively* "entitled" to

choose their course of conduct in light of "what the state commands or forbids," *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972), at the time they act.

Because MPPAA violates the fundamental right to notice and fair warning by imposing a new and unexpected liability for pre-enactment conduct not subject to prior regulation by ERISA, the Government must advance an extraordinary justification for the retroactive application of withdrawal liability. The rationales advanced—the need to deter conduct that prior Congresses had chosen to leave unregulated in the particular to which a subsequent Congress seeks to subject it to retroactive regulation and the need to insulate a government agency from undue exposure arising from its contractual obligations as an insurer—are insufficient justifications for depriving our citizens of their constitutional right to notice and fair warning.

ARGUMENT

I. THE RIGHT TO NOTICE AND FAIR WARNING IS A FUNDAMENTAL ONE.

There is no right more "fundamental to our scheme of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319, 325 (1937), than the right of every citizen to notice and fair warning of the conduct regulated by law and the consequences thereof. Notice is an "elementary and fundamental requirement of due process." *Mennonite Bd. of Missions v. Adams,* 51 U.S.L.W. 4872, 4873 (U.S. June 22, 1983). The right to notice and fair warning of the conduct regulated by law and the consequences thereof is the founda-

tion of ordered liberty under law. "Living under a rule of law entails various suppositions, one of which is that all persons are entitled to be informed as to what the state commands or forbids" so that they can govern their behavior accordingly. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

There can be few "principle[s] of justice [more deeply] rooted in the traditions and conscience of our people," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), than the principle that the Government must give notice and fair warning of what the law is to the citizen who is duty bound to regulate his behavior according to existing law. *See South East Chicago Comm'n v. HUD*, 488 F.2d 1119, 1122 (7th Cir. 1973); 1 Blackstone, *Commentaries* 46. The Government's duty to promulgate and the citizen's duty to obey go hand in hand. Retroactive lawmaking is the hallmark of tyranny.

If we are to remain a "government of laws and not of men," *Marbury v. Madison*, 5 U.S. (1 Cranch) 157, 163 (1803), the citizen must be *at least presumptively* entitled to choose his course of conduct in light of the law in effect at the time he acts without fear of being held to account for that conduct pursuant to the terms of a later-enacted statute. Our concept of constitutional liberty becomes a cruel illusion if, as the Fourth Circuit ruled in *Republic*, the citizen is "required at peril of life, liberty or property to speculate," *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939), on the outcome of bills pending in Congress. *See* 718 F.2d at 638. Vague laws are unconstitutional because they violate the right to "fair warning" that is the predicate for the "free[dom] to steer between lawful and unlawful conduct" and to avoid liability by altering conduct. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). As applied to pre-enactment conduct, MPPAA is unconstitutionally "vague" in "all of its [retroactive] ap-

plications," *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 490 (1982), because—no matter how clear the statutory language which came into being after the fact—it could not have given any citizen acting in advance of its enactment the notice, fair warning and opportunity required by the Due Process Clause to choose his course of conduct in light of "what the state commands or forbids." *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972).

Like vague laws, statutes which apply retroactively to pre-enactment conduct cripple the citizen's ability to regulate his behavior with due regard for the rights of others. They undermine the autonomy of the citizen, impair the dignity of man, and breed disrespect for the law. Creating new liability-imposing incidents after the fact is, quite simply, a capricious way of regulating the conduct of free and autonomous citizens. It is fundamentally unfair and unjust—indeed, it is arbitrary and irrational, *Untermyer v. Anderson,* 276 U.S. 440, 445 (1928)—to impose a disabling liability on a citizen who would have avoided it by altering his conduct but who cannot undo what already has been done.

That the right to notice and fair warning is a fundamental one is evident from this Court's precedents. The fundamental character of the right is implicit in this Court's void for vagueness decisions. The teaching was made explicit in *Marks v. United States,* 430 U.S. 188, 191-92 (1977). And, just last Term this Court again observed that notice is an "elementary and fundamental requirement of due process." *Mennonite Bd. of Missions v. Adams,* 51 U.S.L.W. 4872, 4873 (U.S. June 23, 1983), quoting *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950).

That the right to notice and fair warning is a fundamental one—or at least a sufficiently important one to require

the Government to advance an extraordinary justification for retroactive application of a statute, *i.e.*, something more than that it is one of many expedient means to a legitimate legislative end—also lies at the heart of many of this Court's decisions declaring unconstitutional statutes which are retroactive in application.

Thus, in *Untermyer v. Anderson*, 276 U.S. 440 (1928), this Court declared retroactive application of a new gift tax unconstitutional even though a final House-Senate conference report on the bill was near approval when the taxpayer made the gift which was not taxable under the law in effect at the time he acted. Responding to the contention that it was permissible to apply the statute to a transaction that occurred "while the bill containing the questioned provisions was in the last stage of progress through Congress," the Court ruled that the taxpayer "may justly demand to know when and how he becomes liable for taxes—he cannot foresee and ought not to be required to guess the outcome of pending measures." *Id.* at 445-46. Simply put, the citizen had a constitutional right to notice and fair warning secured by the Due Process Clause.

To be sure, this Court has never held that a civil statute which is retroactive in application is *per se* unconstitutional. There are few *per se* rules of constitutional law. Thus, in addressing the constitutionality of statutes retroactive either in application or effect, the Court has left room for the play of its practical wisdom and the exigent circumstances of the day. It does not follow, however, that statutes which attempt to reach back in time and impose a new liability for pre-enactment conduct or which alter executed contractual relations should enjoy the strong presumption of constitutionality accorded to statutes prospective in application. Statutes which alter for the future the incidents of executory contracts formed prior to enact-

ment are not uncommon. They have produced mixed constitutional results.[7] *Compare, e.g., Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978), *with Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). But, outside the area of income taxation, the truly retroactive statute—one that creates a new liability triggered solely by pre-enactment conduct or one which alters the consequences of executed contracts—is rarely indulged and seldom sustained. *E.g., Helvering v. Helmholz*, 296 U.S. 93 (1935); *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935); *Nichols v. Coolidge*, 274 U.S. 531 (1927); *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922).

The cases which sustain the constitutionality of retroactive application of income taxes are truly "*sui generis*." *Peick v. PBGC*, 539 F.Supp. 1025, 1054 (N.D. Ill. 1982), *aff'd*, No. 82-2081 (7th Cir. Dec. 19, 1983). Many involved alteration of only the rate of taxation, as opposed to the creation of a "new tax." *United States v. Darusmont*, 449 U.S. 292, 299-300 (1981). Statutes which alter the rate of taxation do not deprive the citizen of notice and fair warning of the conduct triggering the liability. *Compare, e.g., Untermyer v. Anderson*, 276 U.S. 440, 445-46 (1928)

[7] Of course, when the Government attempts to alter for the future its own contractual obligations, a heightened degree of judicial scrutiny applies. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 & n.25 (1977); *Nachman Corp. v. PBGC*, 592 F.2d 947, 959 n.23 (7th Cir. 1979). *Compare, e.g., Norman v. Baltimore & O. R.R.*, 294 U.S. 240 (1935), *with Perry v. United States*, 294 U.S. 330 (1935). Heightened scrutiny should apply in this case because the declared purpose of imposing an unlimited withdrawal liability was to insulate PBGC, an agency of the United States, from undue exposure as the insurer of multiemployer pension plans. H.R. Rep. No. 96-869, Part I, 96th Cong., 2d Sess. 57, *reprinted in* 1980 U.S. Code Cong. & Adm. News 2975; *see* PBGC Study, *supra* n.1, at 2, 10 n.16, 13-16, 94-98, 102-06. Simply put, it was to shift the costs and risks of PBGC's contractual obligations to private employers. *See* pp. 22-30 *infra*.

(new tax), *with Milliken v. United States*, 283 U.S. 15, 21 (1931) (new rate).

Moreover, there is special justification for retroactive application of tax statutes generally and of income tax statutes in particular. Taxes are simply "a way of apportioning the cost of government" from which "no citizen enjoys immunity" because all citizens share equally in the benefits thereof. *Welch v. Henry*, 305 U.S. 134, 146-47 (1938). And, an income taxpayer is unlikely to bite off his nose to spite his face, *i.e.*, to refuse income, simply to avoid a tax liability triggered by its receipt. *See id.* at 148. Thus, when income taxes or excise taxes laid on profits derived from a past transaction are at issue, the Court has intimated that constructive notice of impending changes in the tax laws will suffice. *See United States v. Darusmont*, 449 U.S. 292, 299-300 (1981); *United States v. Hudson*, 299 U.S. 498, 501 (1937).

When the taxpayer could not have "reasonably . . . anticipated" the liability triggered by "the particular voluntary act which the statute later made the taxable event," however, this Court has declared retroactive application of statutes creating new taxes unconstitutionally "harsh and oppressive." *Welch v. Henry*, 305 U.S. 134, 147 (1938). Statutes which impose a new liability for pre-enactment conduct not previously regulated "in the particular" to which the citizen later objects, *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38 (1940), are harsh and oppressive because, however severely they impair the citizen's property interests, they also deprive the citizen of a significant liberty interest—the opportunity to choose his course of conduct in light of the law in effect at the time he acts. As the citizen "may justly demand to know when and how" he becomes subject to new taxes or civil liabilities triggered by pre-enactment conduct that may have been altered if fair warning had been given, con-

structive notice of impending changes in the law usually is not enough because the citizen "cannot foresee and ought not to be required to guess the outcome of pending measures." *Untermyer v. Anderson*, 276 U.S. 440, 445-46 (1928).

The same principle is also embodied in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). To be sure, the Court observed therein that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations" even when "the effect of the legislation is to impose a new duty or liability based on past acts." *Id.* at 16. But, as the Court observed, "It does not follow, however, that what Congress can legislate prospectively, it can legislate retrospectively." *Id.* And, although not specifying what degree of special scrutiny governed retroactive legislation, the Court made crystal clear that the justifications advanced for prospective legislation "may not suffice" for retrospective legislation and must take into account "[w]hether or not a person who could have anticipated the potential liability attaching to his chosen course of conduct would have avoided the liability by altering his conduct." *Id.* at 17 & n.16; *accord, Adams Nursing Home of Williamston, Inc. v. Matthews*, 548 F.2d 1077, 1080-81 (1st Cir. 1977).

In *Turner Elkhorn* there was no reason to believe that the employers would have altered their conduct had the statute been in effect at the time the incidence of pneumoconiosis occurred. Indeed, they did not even press the contention. 428 U.S. at 17. They had "clearly been aware of the danger of pneumoconiosis for at least 20 years," as well as their duty to compensate workers for physical injuries caused by dangerous working conditions. *Id.* The tort liability[8] imposed was well within the mainstream of

[8] There is a justification for the retroactive imposition of liability in tort that does not apply to the retroactive alteration of ex-

(Footnote continued on following page)

longstanding and "familiar principles of workmen's compensation." *Id.* at 781 (Powell, J., concurring).

Moreover, the actual retroactivity of the statute at issue in *Turner Elkhorn* bordered on the *de minimis*. The disease was a progressive one whose "symptoms may become apparent only after a miner has left the coal mines." *Id.* at 7-8. And, though the statute had "some retrospective effect" insofar as it required compensation for present injury "bred" in the past, *id.* at 15-16, in actual application it was almost entirely prospective. Because of the progressive and late-manifesting character of the disease and because the Government paid almost all claims filed in the first few years after enactment, the employers were "not ordinarily [held] liable for any disabilities maturing before enactment."[9] *Id.* at 8-10, 15 & nn. 14, 18. Read

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[8] *continued*

ecuted contractual relationships. Tortious conduct causing the physical injury which triggers the duty to compensate is unlikely to have been altered even if notice and fair warning of the statutory liability had been given. Because contractual relationships are planned and bargained for, their retroactive alteration is more likely to disrupt legitimate expectations on which the parties have relied. *Turner Elkhorn*, thus, can be harmonized with *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935). As this Court said in *Turner Elkhorn*, there is a critical distinction between retroactive alteration of the compensation package bargained by the parties in *Alton*, insofar as the statute rewrote the terms and conditions of an executed contractual relationship, and the imposition of a duty to compensate for present physical injury caused by past working conditions controlled by an employer. *See* 428 U.S. at 19 & n.18.

[9] When tortious conduct gives rise to a physical injury that does not manifest itself until after enactment of a statute, or when a statute "merely enlarge[s]" the remedy for breach of a pre-existing duty of due care, "in truth there is no retroactivity." *Norfolk, B & C Lines, Inc. v. Director*, 539 F.2d 378, 380-81 (4th Cir. 1976), *cert. denied*, 429 U.S. 1078 (1977). Statutes which impose liability in tort for physical injuries of a continuing character are not retroactive in the same sense as a statute like MPPAA is, as the tort itself is not complete until the resulting injury has matured.

as a whole and in light of the factual context of the case and the arguments actually advanced to the Court, *Turner Elkhorn* does not hold that statutes retroactive in application are entitled to the same presumption of constitutionality accorded statutes which, though having some retrospective effects, are prospective in application. Like the statute at issue in *Nachman*, and unlike MPPAA, the statute upheld in *Turner Elkhorn* had retrospective effects but was almost entirely prospective in application.

This distinction is of critical significance. A somewhat deferential standard of review for legislation which has some retrospective effects but which is prospective in application may be appropriate. A statute like MPPAA, however, should trigger a different standard of review. By imposing a new and unexpected liability for pre-enactment conduct, statutes which are wholly retroactive in application infringe the fundamental right to notice and fair warning that is a presupposition of any rule of law. This Court should now make explicit what already is implicit in its precedents. When Congress seeks to legislate retroactively with respect to *past* acts and *executed*,[10] as opposed to executory, contractual obligations, it must have an extraordinary justification for retroactive application of statutes creating a new and unexpected liability for pre-enactment conduct.

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[10] In *Louisville & N.R. v. Mottley*, 219 U.S. 467 (1911), this Court held that Congress could declare invalid for the future a lifetime free pass issued by a railroad. Had Congress also attempted to make the holders thereof pay for trips previously taken, however, a different result surely would have been reached. *E.g., Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922). Gray's contractual obligation to the Carpenters Fund had terminated at the time of MPPAA's enactment.

II. RETROACTIVE APPLICATION OF MPPAA IMPAIRS THE FUNDAMENTAL RIGHT TO NOTICE AND FAIR WARNING AND DISRUPTS THE OPERATION OF POLITICAL CHECKS DESIGNED BY THE FRAMERS.

That retroactive application of MPPAA impairs the fundamental right to notice and fair warning by imposing a new and unexpected liability for pre-enactment conduct cannot be doubted. Prior to MPPAA, no employer contributing to a multiemployer pension plan had any federal statutory duty to pay any money to the pension funds. There was no such thing as "withdrawal liability," and the cessation of contributions to a multiemployer fund did not trigger the imposition of liability on any employer.

Employers were subject to a contingent termination liability under the pre-MPPAA provisions of ERISA, a reimbursement liability payable to PBGC that was prospectively applied and scrupulously limited to 30% of an employer's net worth, which this Court has characterized as a "reasonable *ceiling*" on employer liability,[11] *Nachman*

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[11] ERISA also contained a provision for hardship relief whereby employers could be absolved of all liability. 29 U.S.C. § 1304(f)(4) (1976), *discussed in Nachman Corp. v. PBGC*, 446 U.S. 359, 383 & n.34 (1980). It also had a provision mandating a system whereby employers could insure themselves against withdrawal liability, 29 U.S.C. § 1323 (1976), a system that was never implemented and later repealed by MPPAA because neither PBGC nor private insurers would accept the risks of insuring the liabilities of multiemployer pension funds allocated as withdrawal liability. H.R. Rep. No. 96-869, Part II, 96th Cong., 2d Sess. 63, *reprinted in* 1980 U.S. Code Cong. & Adm. News 5908. The existence of these moderating provisions and the 30% of net worth cap were central to the Seventh Circuit's holding in *Nachman* that the *prospective* application of termination liability withstood constitutional scrutiny. 592 F.2d at 962-63. Unlike ERISA, which "careful[ly] . . . approached the problem of retroactivity," 446 U.S. at 382, MPPAA imposes a new and unlimited withdrawal liability on the basis of pre-enactment conduct without any provision for hardship relief or an employer-insurance option.

Corp. v. PBGC, 446 U.S. 359, 386 (1980) (emphasis added). 29 U.S.C. §§ 1362(b)(2), 1364 (1976). The liability was not triggered by an employer's cessation of contributions but rather was contingent upon a fund's termination and PBGC's discretionary election to insure unfunded benefits upon plan termination.

Indeed, under the pre-MPPAA provisions of ERISA, the act later defined as a "withdrawal" by MPPAA—the cessation of contributions—was a liability-mitigating act because the reimbursement liability paid to PBGC on plan termination was owed only by those employers which had contributed to the plan during the five years prior to its termination. Thus, what was a liability-*mitigating* act under ERISA *retroactively* became a liability-*creating* act under MPPAA.

To suggest as some lower courts have that MPPAA did not impose any new or unexpected liability on employers simply flies in the face of reality.[12] *Compare, e.g., Peick*

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[12] Republic agreed to buy Johnson's stock in May 1978 at its book value as reflected in Johnson's audited financial statements and in "complete reliance" thereon. Riss Affidavit ¶¶ 9, 14, *Republic* App. 152a-153a. Those statements did not disclose any contingent termination liability created by ERISA arising out of Johnson's participation in multiemployer pension funds. *See id.* ¶ 16, at 153a.

Prior to enactment of MPPAA, the unfunded vested benefit liability of multiemployer pension plans was not generally treated as a liability of contributing employers under generally accepted accounting principles. *See* Accounting Principles Board ("APB"), Opinion No. 8 (Nov. 17, 1966), Financial Accounting Standards Board ("FASB"), Interpretation No. 3 of APB Opinion No. 8 (Dec. 1974), FASB, Statement of Financial Standards No. 36 (May 1980), *reprinted in* FASB, *Financial Accounting Standards—Original Pronouncements as of June 1, 1982 ("Original Pronouncements"),* at 149-65, 1289-93, 2033-34 (1982) (Lib. Cong. Cat. No. 82-70424). In practice, multiemployer pension plans generally were considered defined contribution plans for accounting purposes prior to enactment of MPPAA, and a company's share of a plan's unfunded vested benefit liability usually was not even disclosed in footnotes

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v. PBGC, 539 F.Supp. 1025, 1044-46 (N.D. Ill. 1982), *aff'd*, No. 82-2081 (7th Cir. Dec. 19, 1983), *with* Riss Affidavit ¶¶ 9, 14 & 30, *Republic* App. at 152a-153a, 157a, *and* n.12 *supra*. Even if the conduct triggering the liability was the same under ERISA and MPPAA, which it is not, even if withdrawal liability were payable to the same entity as termination liability, which it is not, and even if the liability were measured in the same way, which it is not, the difference between a contingent liability limited to 30% of net worth and a fixed liability that may, and in many cases does, substantially exceed an employer's entire net worth is a difference so radical that Congress erroneously thought it would start a stampede of employers out of multiemployer funds. *See* pp. 25-26 *infra*.

Nor is there any principled basis for concluding that the pre-enactment legislative history of MPPAA gave employers fair warning of their potential liability. Though

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[12] *continued*

to its financial statement. *See* American Institute of Certified Public Accountants, *Illustrations and Analysis of Disclosures of Pension Information—A Survey of the Application of FASB Statement No. 36, An Amendment of APB Opinion No. 8*, at 11-13 (1981).

In recognition of the "new funding requirements and obligations for employers that participate in multiemployer pension plans" created by MPPAA, the FASB has undertaken a major review of the principles governing the accounting and disclosure of pension plan liabilities that would take into account "the effects of the Act." FASB, Technical Bulletin No. 81-3 (Feb. 1981), *reprinted in Original Pronouncements*, at 4039. The discussion memorandum recently released by the FASB may result in a new approach being taken to accounting for, and disclosure of, the liabilities associated with multiemployer plans. *See* FASB, *An Analysis of Additional Issues Related to Employers' Accounting for Pensions and Other Postemployment Benefits* 31-37 (Apr. 19, 1983). Any forthcoming changes, however, will come too late to aid the employers sandbagged by retroactive application of MPPAA who acted in reliance on pre-existing law and accounting principles framed in light thereof.

this Court has on rare occasion adverted to pre-enactment legislative developments as affording citizens some warning of what the law was to become, it has done so only in cases in which there was little reason to believe that a citizen would have altered his course of conduct in any event. *See United States v. Darusmont*, 449 U.S. 292, 299-300 (1981); *United States v. Hudson*, 299 U.S. 498, 501 (1937); pp. 11-12 *supra*.

When a statute alters only the rate of taxation or adjusts merely the procedural or remedial consequences of primary conduct that already was subject to prior regulation "in the particular" to which the citizens objects, *Veix v. Sixth Ward Bldg. Ass'n*, 310 U.S. 32, 38 (1940), the citizen has little ground to complain that he has been deprived of fair warning of the conduct triggering the liability. *Cf. Dobbert v. Florida*, 432 U.S. 282, 297-98 (1977). But the wholesale revision of the regulatory scheme effected by MPPAA hardly amounts to a "tinkering" with prior law. And, however widely publicized the Congressional deliberations may or may not have been, the fact of the matter is that many employers, including Republic, did not know what Congress had in mind for them and "would have avoided the liability by altering [their] conduct." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 n.16 (1976). *See* Riss Affidavit ¶ 30, *Republic* App. at 156a. Republic, however, never had an opportunity to choose between corporate life and death. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 264 (1978) (*Brennan*, White & Marshall, JJ., dissenting).

This is a *big* country. Not everyone lives in Washington, D.C. or has the wherewithal to stay current with the thousands of bills introduced in Congress each year and to track their transmutations as they wind their way through the legislative labyrinth. That persons as sophisticated as the officers and directors of Republic and the

attorneys and accountants who advised them, *see* Riss Affidavit ¶¶ 2-5, 30, *Republic* App. 150a-151a, 157a, were unaware of the bills which ultimately evolved into MPPAA shows how specious and dangerous the fiction of pre-enactment notice is.[13]

It is one thing to say that the citizen has a duty to know what existing law is. Government could not function if ignorance of the law were routinely recognized as a defense to the imposition of criminal or civil liability. It is quite another thing, however, to say that the citizen also has a duty to know the terms and conditions of every bill proposed in Congress and to regulate pre-enactment conduct on the basis of speculation as to what the law will become.[14] This Court should squarely reject that notion now, as it has in the past. *Untermyer v. Anderson*, 276 U.S. 440, 445-46 (1928). The citizen should not be required, "at peril of life, liberty or property to speculate,"

[13] PBGC intimates that retroactive application of MPPAA can be justified on the theory that citizens are "culpable" for failing to read every page of the *New York Times* and the *Wall Street Journal* every day. *See* PBGC Brief at 35 & n.33. The truth is that the legislative evolution of MPPAA was not front-page news in newspapers of general circulation throughout this big country. But, even if it were, the newspaper accounts on which PBGC relies at most gave notice of actions taken by Congressional committees on a pending bill. A bill is not law, and actual or constructive notice of action on pending bills is not the notice of "what the state commands or forbids" to which the citizen is constitutionally "entitled." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). *See also Texaco, Inc. v. Short*, 102 S.Ct. 781 793 (1982).

[14] If the citizen not only has a duty to know the terms and conditions of every bill pending in Congress but also to regulate pre-enactment conduct on the basis thereof, it would follow that the attorneys and accountants who failed to advise the directors of Republic and Johnson that the termination of Johnson's operations would expose Johnson and Republic to a liability exceeding the combined net worths of both companies are guilty of malpractice *per se*. *See* Riss Affidavit ¶¶ 9, 14, 16, 30, *Republic* App. at 152a-153a, 157a. *But see* n.12 *supra* & pp. 21-22 *infra*.

Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939), on the outcome of bills pending in Congress.

We have constitutionally mandated processes for the enactment of law, processes that the Framers deliberately made unwieldly and inefficient to serve "essential constitutional functions" and "to protect the people from the improvident exercise of power" by their representatives in the political branches. *INS v. Chadha*, 103 S.Ct. 2764, 2787 (1983). That retroactive application of a statute may be "efficient, convenient and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Id.* at 2780-81. Because a bill cannot become part of the law of the land until it has passed through all the constitutional processes mandated by the Framers, it makes no sense to say that a bill proposed in Congress can give constitutionally adequate notice and fair warning of what the law is before the bill even becomes law.[15]

[15] In fact, Senator Armstrong remarked that a clean copy of S. 1076, which had been amended 335 times between committee and full Senate consideration, was not even *available* on the Senate floor at the time the Senate passed its first version of what ultimately evolved into MPPAA. 126 Cong. Rec. S 10168 (daily ed. July 29, 1980). In his view, the Senate was "[f]umbling half blind through a bill" that it did not understand. *Id.*

If a member of Congress has no access to a copy of a bill at the time he votes on it, how can a private citizen fairly be charged with knowledge of its contents? And, though some lower courts have observed that the House bill passed on May 22, 1980 and the Senate bill passed on July 29, 1980 were "substantially similar," *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 638 (4th Cir. 1983), *petn. for cert. pending*, No. 83-541 (U.S.), in fact there were substantial differences between them. For example, the so-called "trucking industry" exemption now embodied in 29 U.S.C. § 1383(d), which states that a permanent cessation of contributions is not a "withdrawal" in certain circumstances, was added by Senate floor amendment on July 29, 1980. 126 Cong. Rec. S 10106,

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Retroactive regulation of pre-enactment conduct not only impairs the citizen's fundamental right of fair warning but also impairs the operation of political checks built into the Constitution by the Framers. One of the most important is that the whole House must stand for election every two years. U.S. Const. Art. I, § 2, cl. 1. In a very real sense, we have a new Congress every two years. As the personality of the Congress changes, so also do its policy judgments. All statutes which are retroactive *in application* tend to impair to some degree the political checks wrought by the Framers. They deliberately made it hard to make law. A subsequent Congress can regulate primary conduct that prior Congresses chose to leave *unregulated*, but only after a bill goes through all the constitutional processes mandated by the Framers. *INS v. Chadha*, 103 S.Ct. 2764 (1983). Until then, the particular regulatory scheme deemed necessary and appropriate by prior Congresses remains the law of the land, and our citizens should be *at least presumptively* entitled to act in reliance thereon.

III. THERE IS NO PRINCIPLED JUSTIFICATION FOR RETROACTIVE APPLICATION OF MPPAA.

Protection of the retirement benefits of millions of Americans is surely a worthy goal to pursue. It does not follow, however, that Congress can use any means it chooses to attain that goal. The means chosen must not only have a rational relation to the goal in the expedient

[18] *continued*

10201 (daily ed. July 29, 1980). If the differences between the House and Senate bills were as miniscule as some lower courts have suggested, why is it that the two houses of Congress could not reach agreement on a common bill until September 18 and 19, 1980, respectively? 126 Cong. Rec. S 12901 (Sept. 18, 1980); 126 Cong. Rec. H 9180 (Sept. 19, 1980).

sense that the means tend to effectuate achievement of the goal, but also must be otherwise consistent with the Constitution. The means chosen by Congress to achieve its goal—the retroactive imposition of a new liability triggered by pre-enactment conduct—has little to commend it as a practical matter and much to condemn it as a constitutional matter.

When Congress first considered mandatory insurance for multiemployer plans when enacting ERISA, there was doubt whether the scheme would be feasible without recourse to public funds. *See, e.g.*, H.R. Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Adm. News 4666. Accordingly, Congress deferred mandatory coverage for multiemployer plans until January 1, 1978. H. Conf. Rep. 93-1290, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Adm. News 5160. As the date for mandatory coverage neared, alarm was expressed that PBGC might not have the resources needed to insure multiemployer plans, so Congress deferred coverage and directed PBGC to study the feasibility of the insurance program. Pub. L. No. 95-214, 91 Stat. 1501 (1977).

In the report submitted to Congress on July 1, 1978, PBGC observed that, prior to ERISA, "terminations of multiemployer funds were *extremely rare.*" PBGC Study, *supra* n. 1, at 4 (emphasis added). But ERISA, Congress's prior "cure," had aggravated the financial problems of multiemployer funds by imposing unbargained-for minimum vesting requirements that doubled, trebled or quadrupled their unfunded vested benefits liabilities, Lo Cicero Affidavit ¶¶ 14, 16.11, *Republic* App. at 190a-193a, and by "restrict[ing] some of the action plans previously took to avert a termination," PBGC Study, *supra* n. 1, at 4, such as reducing benefit levels.[16] Prior to ERISA, multi-

[16] Unlike single-employer plans wherein benefit levels are collectively bargained, as in *Nachman Corp. v. PBGC*, 446 U.S. 359,

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employer plans had a number of ways of dealing with employer withdrawals, self-help remedies restricted by ERISA. *Id.* at 94. MPPAA was a "cure" for a "disease" that, in large measure, was caused by Congress's enactment of ERISA. *Id.* at 4, 15-17, 22-24, 94.

Not surprisingly, PBGC also reported that mandatory insurance would not be feasible if PBGC, a government agency, had to bear the burden of insuring the "inherited liabilities" of multiemployer plans. *Pension Plan Termination Issues: Hearing Before the Subcommittee on Oversight of the Committee on Ways and Means House of Representatives*, 95th Cong., 2d Sess. 23 (1978) [hereinafter "*Hearings*"]. They had come into being because plan trustees had promised more benefits than the collectively bargained contributions could fund, because economic forces had eroded plan contribution bases, and because ERISA had mandated unbargained-for minimum vesting requirements and precluded traditional self-help remedies for the problem of employer withdrawals. Lo Cicero Affidavit ¶¶ 14-15, 16.11-.14, *Republic* App. at 190a-193a. PBGC feared that the "cure" of mandatory insurance would create a new "disease"—increased terminations of underfunded plans. Because the employers' reimbursement liability to PBGC was limited by ERISA to 30% of net

[16] *continued*

363-65 & n.5 (1980), multiemployer plans are based on defined contributions established by collective bargaining agreements that do not obligate the contributing employers to fund a defined level of benefits. Rather, benefits are independently established by the fund trustees, who owe a fiduciary duty of undivided loyalty to plan participants, *NLRB v. Amax Coal Co.*, 453 U.S. 322, 336-37 (1981), based on their actuary's estimate of the amount of benefits that can be funded with the defined contributions. Prior to ERISA, benefit levels could be adjusted, *i.e.*, reduced, if plan trustees and actuaries had miscalculated the amount of benefits that the collectively bargained contributions could fund. ERISA precluded that.

worth, while PBGC would have a contractual duty to pay most of the participants' vested benefits, a mandatory insurance scheme would create incentive for union-employer cooperation in terminating underfunded plans. PBGC Study, *supra* n. 1, at 23, 96-97.

PBGC's proposed cure for the disease that would be created by a mandatory insurance program was to make employers pay the "inherited liabilities" of the funds that PBGC otherwise would have a contractual duty to insure. *Hearings* at 23. It proposed that an employer withdrawing from a multiemployer fund be required to pay "its fair share" of the plan's liabilities. *Id.* (Republic's "fair share," of course, substantially exceeds its entire net worth, as well as the cumulative net earnings of Johnson over the 35 years of its corporate existence! Riss Affidavit ¶ 44, *Republic* App. at 161a.)

So, in arriving at "equitable solutions" to the problem of the plans' inherited liabilities, H.R. Rep. No. 96-869, Part I, 96th Cong., 2d Sess. 63, *reprinted in* 1980 U.S. Code Cong. & Adm. News 2931-32, Congress imposed unlimited withdrawal liability on employers but, not surprisingly, declined to pay its "fair share" of the inherited liabilities—the share that Congress had created by enacting unbargained-for minimum vesting requirements and benefit-reduction prohibitions in ERISA.

There was, however, a problem with the supposed "cure" of unlimited withdrawal liability. The treatment proposed was so radical that it would create yet another "disease"—employer incentive to withdraw before the withdrawal liability "cure" went through the constitutional processes mandated by the Framers for becoming part of the law of the land. PBGC Study, *supra* n. 1, at 105-06. So PBGC and Congress devised an even more radical "cure" for this additional, short-lived, "disease"—the

retroactive imposition of unlimited, unanticipated and unbargained-for withdrawal liability. Threatening the retroactive application of withdrawal liability in a bill that was not yet part of the law of the land would deter the "rush to leave a plan before the [otherwise prospective] effective date of the new withdrawal rules" and would protect the solvency of the funds even if deterrence did not work. *Id.* at 106.

The stampede of employers that PBGC feared and predicted did not occur. 126 Cong. Rec. S 10101 (daily ed. July 29, 1980) (remarks of Sen. Javits). Many employers were unaware of the pending bills. More important, although the articulated justification for retroactive application of MPPAA was to deter "opportunistic" employers, 126 Cong. Rec. S 10156 (daily ed. July 29, 1980) (remarks of Sen. Matsunaga), from withdrawing while Congress was still debating what the law of the land ought to become, there was no need to use such extraordinary means to deter voluntary withdrawals. Long-term collective bargaining agreements mandating multiemployer plan contributions precluded the "voluntary withdrawals" that PBGC and Congress were seeking to deter. PBGC Study, *supra* n. 1, at 97. In fact, the manner in which Congress defined "withdrawal" virtually guaranteed that the retroactively imposed liability would fall on those least able to bear the burden of funding the inherited liabilities that PBGC sought to escape from. *See* n.6 *supra*.

Solvent employers that were able to compete and make a profit in the marketplace had no incentive to go out of business to escape the obligation to contribute imposed by existing collective bargaining agreements. Moreover, even if their existing agreements terminated during MPPAA's consideration, they would be unlikely to successfully negotiate a "withdrawal," *i.e.*, a cessation of pension plan contributions, through collective bargaining.

The employers sandbagged by retroactive application of MPPAA are, by and large, employers like Johnson that "escaped" the contribution obligation imposed by their collective bargaining agreements by going out of business because of economic hardship, or employers like Gray that were unable to negotiate a mutually acceptable collective bargaining agreement after expiration of the agreement imposing the duty to contribute whose cessation now constitutes "withdrawal." 29 U.S.C. § 1383(a).

It is no accident that the withdrawal liability claims asserted against the employers caught unawares by retroactive application of MPPAA often approach or even exceed the entire net worth of the companies affected. Declining industries are a product of economic forces that cannot be deterred by the retroactive imposition of withdrawal liability. The companies effecting pre-enactment withdrawals from plans covering declining industries did so because they were suffering from the economic decline. Wittingly or unwittingly, the legislative scheme was designed in such a way that its retroactive application would catch pre-enactment "withdrawals" that usually were caused by economic forces beyond the control of the employers involved,[17] as opposed to "evasive" withdrawals of solvent employers.

In fact, the asserted justification for the retroactive imposition of withdrawal liability is at war with what Con-

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[17] Indeed, even as applied prospectively, the employers being caught by withdrawal liability are not those which withdraw in order to escape pension funding obligations, but rather for other reasons that often are totally outside their control. *E.g., Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund*, 81-2738-S (D. Mass. Aug. 3, 1983) (eminent domain taking of employer's work site), *appeal docketed*, No. 83-1804 (1st Cir.); *Aronson Tire Co. v. Pisano*, No. 81-2554 (D. Mass. filed Oct 7, 1981) (employee decertification of bargaining representative). *See also* n.20.

gress actually did. It moved the retroactive effective date forward from February 27, 1979 to April 29, 1980, not because it had grounds to fear a post-April stampede of "opportunistic" employers or because the Senate Finance Committee needed more time to study legislative proposals that had been under study for years, but rather—as one of MPPAA's most vigorous proponents was honest enough to admit—simply because of "strong political pressures by certain withdrawing employers who were caught by the earlier date." 126 Cong. Rec. S 10101 (daily ed. July 29, 1980) (remarks of Sen. Javits).

If there was dire need to deter "opportunistic" employers from withdrawing, what principled justification exists for moving the retroactive effective date forward at the behest of the very "opportunistic" employers at which the retroactive effective date purportedly was aimed? There is none, except the same justification that led Congress to shift the burden of paying the funds' "inherited liabilities" from PBGC to contributing employers in the guise of withdrawal liability in the first place—political expediency. It being a politically expedient thing to enlarge and insure the retirement benefits of millions of voters without having to raise taxes to pay for them, MPPAA passed Congress with nary a dissent. Even its most vociferous critics and those who felt the Congress was "[f]umbling half blind" through a bill that it did not understand, 126 Cong. Rec. S. 10168 (daily ed. July 29, 1980) (remarks of Sen. Armstrong), voted for MPPAA. It would have been political suicide not to do so.

The articulated justifications for retroactive application of a "withdrawal liability" that commonly approaches or exceeds the net worth of the employers sandbagged by it cannot withstand scrutiny. This Court should be skeptical when the political branches seek to shift the burden of inherited liabilities that are in no small measure of their own making from a government agency that otherwise

would have had a contractual duty as insurer to pay for them.[18] *See, e.g., United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 & n. 25 (1977); *Perry v. United States*, 294 U.S. 330 (1935). This Court should be very "hesitant" to permit the political branches to justify the retroactive imposition of a new liability triggered by pre-enactment conduct "on any theory of deterrence . . . or blameworthiness." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976). This Court should be skeptical of any cost-benefit analysis advanced to justify the confiscation of an employer's entire net worth, particularly when Congress has declined to pay its fair share of the inherited liabilities it created.[19] *See id.* at 8-9; *Nachman* (7th Cir.), 592 F.2d at 961 & n. 31. And, this Court should have a solicitous regard for the citizen's fundamental right to notice and fair warning, for it is a "presupposition" of any "rule of law." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

For reasons of political expediency, not genuine necessity, Congress chose an unreasonable and immoderate means to a worthy end. The retroactive imposition of a

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[18] It is noteworthy that, *prior* to enactment of MPPAA, PBGC was placed under a legislative mandate to insure multiemployer plans as of August 1, 1980. Pub.L. No. 96-293, 94 Stat. 610 (1980).

[19] The imposition of crushing withdrawal liabilities on employers hardly can be justified on the ground that it represents a "rational measure to spread the costs of the employees' [benefits] to those who have profited from the fruits of their labor." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976). The withdrawal liability asserted against Johnson, for example, exceeds not only the combined net worth of Johnson and Republic but also the cumulative net earnings of Johnson over the 35 years of its corporate existence. Riss Affidavit ¶ 44, *Republic* App. at 161a. For companies effecting "withdrawals" because they went out of business, the cost of withdrawal liability obviously cannot be passed on to consumers. *See* 428 U.S. at 18-19. And, because the liability imposed on them is not limited to the unfunded liability attributable to their own employees, it cannot be rationalized as "an actual, measurable cost" of their own businesses. *Id.* at 19.

crippling and unanticipated "withdrawal liability" on those least able to bear the burden thereof[20] has little to commend it as a practicable solution to the problems Congress sought to address and, more important, much to condemn it as a constitutional matter.

CONCLUSION

This Court should affirm the judgment of the Court of Appeals.

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[20] MPPAA imposes crushing burdens on companies in or near bankruptcy though only a few pension funds have real need. Of the $312.7 million in withdrawal liability identified by the Central States Fund as of October 1983, $231.7 million was allocable to bankrupt companies. Statement of George W. Lehr, Executive Director, Central States, Southeast and Southwest Areas Pension Fund, before the American Trucking Associations Industrial Relations and Personnel Practices Committees, *Transport Topics*, Oct. 24, 1983, at 11. The Fund itself, in contrast, is "very healthy both in terms of membership and financial performance." *Id.* Its unfunded liability is "dwindling rapidly," and it expects to be fully funded by 1990. Interview of George W. Lehr, BNA Daily Labor Report No. 126, June 29, 1983, at C-2.

Recent data suggests that PBGC's Study overstated the financial problems of multiemployer plans. A 1983 survey of 458 multiemployer plans spanning a wide variety of industries revealed that two-thirds were fully funded for vested benefits; that the plans were 90% funded on average; and that only 5% were less than half funded. Martin E. Segal Co., A Survey of the Funded Position of the Multiemployer Defined Benefit Plans (July 20, 1983), *available on request*, Director of Information Services, Martin E. Segal Co., 730 Fifth Avenue, N.Y., N.Y. 10019.